

10275.5 Complaint Issued on Headquarters' Authorization

If a complaint was issued on authorization from any division or branch in Headquarters, clearance should be obtained from that division or branch before withdrawal or dismissal of the complaint.

10276 Postcomplaint Attempts to Withdraw Charge; Dismissal of Complaint

A postcomplaint request by the charging party to withdraw the charge should be closely scrutinized, including the extent to which the act is voluntary. If the request is based on a private settlement, the terms should be examined; if the charging party has “lost interest,” the case should be reexamined as to its strength (a) without charging party’s testimony or (b) with a reluctant charging party’s subpoenaed testimony. The request should be denied if, under all the circumstances, the purposes of the Act appear to require the continuation of formal action.

If the request for withdrawal is approved, the complaint will be dismissed by the Regional Director, the Administrative Law Judge or the Board, depending on the stage of the case at the time such request is filed. Sec. 10275 and Sec. 102.9, Rules and Regulations.

10280 Answer

Within 14 days from the service of the complaint, respondent must file an answer specifically admitting, denying, or explaining each of the facts alleged in the complaint, unless respondent states in its answer that it is without knowledge, thereby operating as a denial. Secs. 102.20–102.22, Rules and Regulations.

With respect to answers that lack particulars, see Sec. 10292.2.

10280.1 Allegations Not Denied Deemed Admitted

Pursuant to Section 102.20, Rules and Regulations, complaint allegations shall be deemed to be admitted as true if no answer is filed. Likewise, any allegation not specifically denied or explained in an answer, unless respondent avers in its answer that it is without knowledge, shall be deemed to be admitted as true and shall be so found by the Board, absent good cause to the contrary.

10280.2 Motion to Strike Improper or Deficient Answer

Where respondent has filed an improper or deficient answer, the Region should provide respondent sufficient notice and an opportunity to appropriately amend the answer. If respondent fails to remedy the deficiency, counsel for the General Counsel should file a motion to strike the answer, in whole or in part.

(a) *Improper or Deficient Answer:* An answer may be improper or deficient, where:

- The answer is not signed.

- The asserted denials in the answer have no legitimate basis and appear to be made solely for purposes of delay.
- Scandalous or indecent matter is included in the answer.

(b) *Notice to Attorney or Representative:* Upon receipt of an improper or deficient answer, the Regional Office should send a letter to the attorney or representative providing an explanation of the improper or deficient nature of the answer. The letter, should also assert that the answer, or a portion of the answer, appears to have been filed without good grounds to support it and for purposes of delay citing Sec. 102.21, Rules and Regulations. The letter should further inform the attorney or representative¹ that unless a proper answer is filed within one week of the letter counsel for the General Counsel intends to file a motion with the Administrative Law Judge to strike the answer, or a portion of the answer, as sham and false and requesting that the Administrative Law Judge “proceed as though the answer had not been served.” See generally OM Memo 05-55.

(c) *Filing of a Motion to Strike* If respondent does not adequately justify or appropriately amend its answer within the time allowed and persists in contesting the matter without good grounds, counsel for the General Counsel should prepare and file with the Administrative Law Judge a motion to strike the answer, or portion thereof, as sham and false. Such motion should request that the action proceed as though the answer, or that portion of the answer, had not been served.

Generally, if such motion is denied by the Administrative Law Judge, counsel for the General Counsel should request special permission of the Board to appeal. Sec. 10404. If the hearing has opened and the ALJ insists on a presentation of the evidence forthwith, counsel for the General Counsel should proceed with the case, simultaneously pressing the appeal to the Board.

If the motion is granted, counsel for the General Counsel should proceed as if only the unstricken portion of the answer has been filed.

(d) *Special Remedy:* In some cases, it may also be appropriate to contact the Division of Advice regarding the possibility of seeking as a special remedy in the underlying unfair labor practice proceeding that respondent be ordered to pay a portion of the General Counsel’s attorney’s fees incurred as a result of the filing of an answer without good grounds to support it.

(e) *Referral of Alleged Misconduct:* Immediately after the conclusion of the hearing, the Regional Office should also consider whether it is appropriate to make a referral of alleged misconduct by the attorney or representative with regard to the improper or deficient answer under Sec. 102.177, Rules and Regulations. See Sec. 10058.6.

¹ If the respondent files an answer without the assistance of an attorney or other representative, the Board has generally given such a party more latitude in reviewing the sufficiency of the answer because such a pro se party is generally unfamiliar with the Board’s Rules and Regulations and procedures. See, e.g., *S&P Electric*, 340 NLRB 326 (2003); and *A.P.S. Production*, 326 NLRB 1296 (1998). In such circumstances, the Regional Office should provide the pro se party with an explanation of the Board’s Rules and Regulations regarding the sufficiency of the answer.

10280.3 No Answer Filed; Motion for Default Judgment

If an answer has not been filed within the time allowed, counsel for the General Counsel should communicate in writing with respondent's counsel, or with respondent if it is not represented, advising that no answer has been filed in accord with the Rules and Regulations and that if an answer is not filed within a certain period of time (normally not to exceed 1 week from date of written communication), counsel for the General Counsel will file a Motion for Default Judgment with the Board. If an answer is not filed within the applicable deadline, counsel for the General Counsel should file a Motion for Default Judgment with the Board. See *Malik Roofing Corp.*, 338 NLRB No. 141 (2003).

If, after the filing of a Motion for Default Judgment, an answer is later filed, the Regional Office may successfully continue to seek default judgment, where the answer was untimely with no explanation. See, e.g., *Kenco Electric & Signs*, 325 NLRB 1118 (1998). However, where respondent is proceeding pro se, the Board may be reluctant to grant a Motion for Default Judgment where respondent answers the complaint and responds to the Board's order to show cause. See, e.g., *A.P.S. Production/A. Pimental Steel*, 326 NLRB 1296 (1998).

10280.4 Answer to Amended Complaint

The above procedures also apply to an answer to an amended complaint. However, with respect to amendments made at the hearing, the nature of the amendment will determine whether the Administrative Law Judge provides 14 days for answer to the amendment. Sec. 10406.2 and Sec. 102.23, Rules and Regulations.

10282 Motion for Summary Judgment in 8(a)(5) Cases**10282.1 Generally**

In technical 8(a)(5) cases (i.e., where respondent is testing a Board certification and/or the proceeding on which it is based and there are no factual issues warranting a hearing), a Motion for Summary Judgment should be filed with the Board. Sec. 10025. In general, if there are factual issues involved, a Motion for Summary Judgment is not appropriate. However, where charging party's allegations include both a technical 8(a)(5) violation and other allegations warranting a hearing, the Regional Director may exercise discretion in appropriate cases to move for summary judgment solely on the technical 8(a)(5) allegations. Under such circumstances, the Regional Office should explicitly reserve the right to litigate the other alleged violations. Such allegations suitable for future litigation include:

- Unilateral changes occurring after the bargaining obligation attaches
- Claims that the 8(a)(5) conduct affects the reinstatement rights of striking employees

See Sec. 10026 generally for a discussion of 8(a)(5) charges and Sec. 10026(b) for avoiding future litigation by entering into a stipulation that is contingent on court enforcement of a Board Order.

10282.2 Regional Procedure

A Motion for Summary Judgment should be filed within 7 days after respondent files its answer in a technical 8(a)(5) case (i.e., respondent is testing the Board certification and/or the proceeding on which it is based).

(a) *Respondent's Answer:* On receipt of respondent's answer to the complaint (or expiration of the time to file an answer), the Regional Director should determine whether to file the motion.

(b) *Motion to Board:* Applications for summary judgment (eight copies each of the motion and attachments) in appropriate 8(a)(5) cases should be addressed directly to the Board and transmitted to the Office of the Executive Secretary.

Since all summary judgment motions must be filed no later than 28 days before the scheduled hearing date (Sec. 102.24, Rules and Regulations), if the Regional Office intends to file such a motion it should either issue a Notice of Hearing without hearing date with the complaint or provide enough time to permit the filing of a timely motion.

In all technical 8(a)(5) cases, if the Regional Office anticipates it will file a Motion for Summary Judgment, the Complaint and Notice of Hearing should set forth that a hearing, if necessary, will be conducted at a time and date to be determined in the future. All copies of the motion to transfer case to and continue proceedings before the Board and for summary judgment must be accompanied by copies of the following documents, if any, in the formal file:

- Original charge and amended charge
- Affidavit of service of charge and amended charge
- Complaint, amended Complaint and Notice of Hearing
- Affidavit of service of complaint, amended Complaint and Notice of hearing
- Respondent's answer and amended answer to complaint
- Letter from counsel for the General Counsel to respondent advising of the consequence of not filing answer. Sec. 10280.3.

In the event that the summary judgment proceeding is an 8(a)(5) case involving test of certification, the record should also include copies of the following documents, if any, in the formal "R" case file:

- The petition

- The Regional Director's decision, consent election agreement, or stipulated election agreement
- Any Request for Review of the Regional Director's Decision and the Board's Order regarding the Request for Review
- Any Board Decision following a grant of the Request for Review
- All postelection matters, including:
 - (a) Objections to election or to conduct thereof
 - (b) Regional Director's or hearing officer's report and recommendations and proof of service of same
 - (c) Exceptions to (b), above, and briefs
 - (d) Supplemental decision, direction, or order, or certification by the Regional Director or the Board.

10283 Other Motions for Summary Judgment

If any party files a timely Motion for Summary Judgment, the Board may deny the motion or issue a Notice to Show Cause why the motion should not be granted.

Once a Notice to Show Cause is issued by the Board, any scheduled hearing will normally be postponed indefinitely. Since Sec. 102.24(b), Rules and Regulations expressly permits any party to file an opposition prior to issuance of the Notice to Show Cause, the Regional Office should file its opposition promptly, even if respondent's motion appears deficient on its face. In any event, all such oppositions must be filed no later than 21 days before the scheduled hearing. It is also advisable for the Regional Office to notify the Office of the Executive Secretary of its intent to file such a motion.

It is not necessary to attach affidavits or other documentary evidence to an opposition or response. A short brief clearly stating the grounds for opposition will normally suffice. Sec. 102.24, Rules and Regulations.

